a

MALAYAN BANKING BHD

v.

TEGUH CONSOLIDATED SDN BHD & ANOR & ANOTHER CASE

b

HIGH COURT MALAYA, KUALA LUMPUR
VISU SINNADURAI J
[CIVIL SUIT NO: S2-22-56-1991]
10 SEPTEMBER 1997

c ***CIVIL PROCEDURE:*** *Pleadings - Striking out - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d) - Discretionary power of court - Inherent jurisdiction of court - Consideration of affidavit evidence*

CONTRACT: *Illegality - Contraravention of statutory provisions - Effect of - Whether invariably renders contract illegal and unenforceable*

d There was a multitude of actions and applications filed by various parties arising from a joint venture project undertaken by Teguh Consolidated Sdn Bhd ('Teguh') with several other parties. Teguh filed a statement of claim against Yata Development Sdn Bhd ('Yata'), and in response Yata filed a defence and a counterclaim. A consent order was entered into, which resulted e in the resolution of all the pending claims except Yata's counterclaim.

Yata's counterclaim was in respect of its loan to Teguh. Teguh disputed the exact amount of the loan and claimed that it did not need to repay the loan as the loan transaction was illegal. Teguh applied to strike out Yata's counterclaim under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High f Court 1980 ('the RHC'), on the ground that the loan was illegal as it contravened the Moneylenders Ordinance 1951 ('the Ordinance'). Teguh argued that the difference between the principal sum borrowed and the sum claimed by Yata amounted to illegal interest which Yata was not entitled to claim or impose. Teguh further argued that Yata was not a licensed moneylender under g the Ordinance, and thereby the imposition of the interest rendered the entire loan agreement illegal and void. Yata on the other hand denied that any illegal or unauthorised interest had been charged and argued that the amount claimed was the actual amount of the loan as proven by the loan agreement and the payment vouchers.

h

The issues before the court concerned the validity of the loan transaction; the exact amount owing; the application of the Ordinance to invalidate the loan agreement; and the application of restitutionary relief especially s. 66 of the Contracts Act 1950 ('the Act').

i

Held:

[1] It is trite law that the court will only strike out pleadings in plain and obvious cases or where the claim on the face of it is obviously unsustainable. In determining whether to strike out cases under O. 18 r. 19 of the RHC, the courts have wide discretionary powers. The High Court also has an inherent jurisdiction to prevent an abuse of its powers. Even if O. 18 r. 19 of the RHC is not expressly pleaded, the High Court in exercise of its inherent jurisdiction may strike out cases which it deems to be an abuse of its process. Except for an application under O. 18 r. 19(1)(a) of the RHC, on determining whether an action ought to be struck off under the other rules, the High Court ought to consider all the relevant evidence as stated in the affidavits before it.

[2] The Ordinance does not prohibit the mere lending of money by one person to another, but rather regulates the conduct of the moneylending business. There must be sufficient evidence before the court, so as to determine the issue whether a person is carrying on the business of moneylending. There was no such evidence before the court in the instant case.

[3] The law relating to illegal contracts and its effect is not without uncertainties. The Federal Court in *Co-operative Central Bank Limited v. Feyen Development Sdn Bhd* pointed out that the contravention of certain statutory provisions does not, in every case, render a contract illegal and unenforceable. The effect of non-compliance of certain statutory provisions on a contract is a difficult question which the court has to decide only after considering the scope and intent of the legislation in question.

[4] Parties to proceedings are entitled to take advantage of the various provisions in the rules for the speedy disposal of their claims but they ought to be slow in making applications which are clearly misconceived, or those which instead of assisting in the speedy disposal of cases, add to the already existing backlog. In the instant case, Teguh had made an application to deny Yata of its rights and to enrich itself unjustly by not repaying the loan. No court of law will lend its hand to mete out injustices to a party to a proceeding. The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power which should be exercised with the utmost caution.

[5] Teguh's application to strike out Yata's counterclaim could not fall within O. 18 r. 19(1)(a) as this rule only applies to clear cases where the pleadings disclose no cause of action.

[Application to strike out counterclaim refused.]

Cases referred to:

Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors [1997] 2 CLJ 406 ***(foll)***

Bandar Builder Sdn Bhd v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 ***(foll)***

Che Wan Development Sdn Bhd v. Cooperative Central Bank Bhd [1992] 2 MLJ 365 ***(not foll)***

Chellapah v. Official Assignee [1971] 1 MLJ 24 ***(refd)***

Chow Yoong Hong v. Choong Fah Rubber Manufactory [1962] AC 209 PC ***(foll)***

Co-operative Central Bank Limited v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 ***(refd)***

Co-operative Central Bank Limited v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 ***(cit)***

Coramas Sdn Bhd v. Rakyat First Merchant Bankers & Anor [1994] 2 CLJ 143 ***(refd)***

Corumo Holdings Ltd v. C Itoh Ltd [1990] 3 ACSR 438 ***(cit)***

Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 ***(refd)***

Golden Century Development Sdn Bhd & Anor v. Ganhoe & Anor [1983] 1 MLJ 86 ***(foll)***

Farrow Mortgage Services Pty Ltd v. Edgar & Ors [1993] 114 ALR 1 ***(cit)***

Harta Empat Sdn Bhd v. Koperasi Rakyat Bhd [1997] 2 CLJ 94 ***(cit)***

Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(foll)***

Menaka v. Lum Kum Chun [1977] 1 MLJ 91 PC ***(dist)***

Muniandy Subrayan & Ors v. Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 CLJ 417 ***(foll)***

New Straits Time (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd [1985] 1 MLJ 226 ***(foll)***

Ngui Mui Khin & Anor v. Gillespie [1980] 2 MLJ 9 ***(foll)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 ***(foll)***

Raja Zainal Abidin Raja Hj Tachid & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 ***(foll)***

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 2 MLJ 324 ***(foll)***

Sadhu Singh v. Sellathurai [1955] MLJ 117 ***(refd)***

Sim Kie Chon v. Superintendent of Pudu Prison [1985] 2 CLJ 449 ***(foll)***

Subramaniam Dhanapakiam v. Ghaanthimathi [1991] 2 MLJ 447 ***(foll)***

Teguh Consolidated Sdn Bhd v. Talam Corp Bhd [1997] 4 CLJ Supp 81 ***(refd)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(foll)***

Tunku Kamariah Aminah Mainumah Iskandariah Sultan Iskandar v. Dato James Ling Beng King [1989] 2 CLJ 244 ***(not foll)***

Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] 2 All ER 961 ***(cit)***

Yeep Mooi v. Hu Chin Chua [1981] 1 MLJ 14 FC ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 24(e), 66

Moneylenders Ordinance 1951, s. 3

Rules of the High Court 1980, O. 18 rr. 19(1)

Other sources referred to:
The Law of Restitution, Goff & Jones, 4th edn
The Supreme Court Practice, 1997

For the plaintiff - Jadjit Singh; M/s Jagjit Singh & Co
For the defendant - Abdul Rahman Ya'acob; M/s Khairuddin Ngiam & Tan

JUDGMENT

Visu Sinnadurai J:

The present action pertains to one of the multitude of actions and applications filed by various parties arising from a joint-venture project undertaken by Teguh Consolidated Sdn Bhd (Teguh) with several other parties. Of particular concern for the present purpose is the suit filed by Teguh against Malayan Banking Bhd (Civil Suit No S2-22-56-91), and an application filed by Malayan Banking against Teguh and Yata Development Sdn Bhd (Yata) in originating summons No S4-24-157-91. Both the civil suit and the Originating Summons were subsequently consolidated. Thereafter, Teguh filed a statement of claim against Yata. Yata, in response to the statement of claim of Teguh, filed not only a defence but also a counterclaim.

On 24 December 1993, a consent order was entered into whereby all issues relating to Malayan Banking, Teguh and Yata in these actions were resolved, except for the counterclaim of Yata. One of the terms of the consent order was that Teguh agreed to deposit a sum of RM480,000 (in relation to the sum claimed by Yata in the counterclaim), pending the disposal of the counterclaim. (The full text of this consent order is now reported in another related case, *Teguh Consolidated Sdn Bhd v. Talam Corp Bhd, with Malayan Banking Bhd (third party)* [1996] 5 MLJ 664). The effect, therefore, of the said consent order was that, except for Yata's counterclaim, all other pending claims of Teguh and Malayan Banking were resolved.

Yata's Counterclaim

Yata's counterclaim against Teguh arose under the following circumstances: Yata alleged that Teguh had requested from Yata a loan of RM401,576.48 to enable Teguh to pay premiums due to the State authorities for certain lands held under 2,215 different title deeds in Negeri Sembilan. For this purpose, the parties entered into a written agreement. In consideration of the loan granted by Yata, and as a security for the loan, Teguh executed a memorandum of deposit of the document of titles to create a lien. Furthermore, two directors of Teguh also executed a guarantee for the repayment of the loan.

It should be noted that Teguh do not deny that a certain sum of money was in fact advanced to Teguh by Yata. Teguh, however, dispute the exact amount of the loan, and also, and more importantly, for reasons stated below, take the view that Teguh need not repay this loan, as the loan transaction was illegal.

Teguh's Present Application (encl 30)

In the present application, in encl. 30, Teguh, by way of summons in chambers has applied to strike out Yata's counterclaim under O. 18 r. 19 of the Rules of the High Court.

Teguh's Contention

Teguh seeks to strike out Yata's counterclaim on the sole ground that the loan granted to Teguh by Yata was illegal as it contravened the Moneylenders Ordinance 1951.

Teguh in support of its contention argued that Teguh had borrowed only a sum of RM377,481.90 from Yata, and that the difference between this sum and the sum claimed by Yata (that is, the sum of RM23,980.34) was illegal interest which Yata was not entitled to impose nor claim. It was therefore argued, that as Yata was not a licensed moneylender under the Moneylenders Ordinance, the imposition of the interest rendered the entire loan agreement illegal and void.

Yata's Reply

Yata denied that any unauthorised or illegal interest had been charged and took the stand that the amount claimed, that is the sum of RM401,576.48 was the actual amount of the loan given to Teguh by Yata. This, it was argued by Yata was fully supported by documentary evidence in the nature of, *inter alia*, the loan agreement and the payment vouchers. Counsel for Yata in his written submission then concluded as follows:

> ... upon closer examination of all the above documents exhibited by the plaintiff (Teguh) and the defendant (Yata), I humbly submit that the loan given by the defendant to the plaintiff is only RM401,576.48 without interests. The plaintiff's allegation that the loan sum is only RM377,576.14 and the defendant charged an interest of RM23,980.34 is baseless and made without concrete reasons. I humbly submit that the plaintiff's allegation that the defendant did levy interest on the loan sum is only an attempt to avoid repayment.
>
> I wish to further submit that, there are a lot of question of facts which have to be scrutinised by this Honourable Court before making any decision. In order to decide this, this Honourable Court has to hear extrinsic evidence in open

court by calling witnesses who will have to be examined, cross examined and re-examined with a view to deciding the whole issue fairly and justly.

The Law

The law relating to striking out pleadings under O. 18 r. 19 of the Rules of the High Court is now clearly settled and well documented. I, therefore, need not delve into this aspect of the law in detail. The following principles may be distilled from the cases.

(a) As striking out pleadings has serious consequences, it is only in plain and obvious cases that the court will exercise this summary process. As pointed out in *The Supreme Court Practice 1997* para 18/19/7:

> ... It is only in plain and obvious cases that recourse should be had to the summary process under this rule ... It cannot be exercised by a minute and protracted examination of the documents and facts of a case in order to see whether the plaintiff really has a cause of action ...
>
> [References omitted]

It is further pointed out in *The Supreme Court Practice 1997* as follows:

> Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule, decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore, where the Court is satisfied, even after substantial argument both at first instance and on appeal, that the defence does not disclose a reasonable ground of defence, it will order it to be struck out ...

These principles have consistently been followed by our courts. For example, Lee Hun Hoe CJ (Borneo) in the Federal Court decision of *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28, at p. 29 observed:

> The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.

In *Roslan bin Abdullah v. New Zealand Insuranc Co Ltd* [1981] 2 MLJ 324, Wan Sulaiman FJ in the Federal Court observed (at p. 325):

> The summary procedure under O. 18 r. 19 can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable": (see *AG of Duchy of Lancaster v. L & NW Rly Co* [1892] 3 Ch 274.

Again in *Golden Century Development Sdn Bhd & Anor v. Ganhoe & Anor* [1983] 1 MLJ 86, Wan Sulaiman FJ in delivering the judgment of the Federal Court reiterated the above principles as follows (at p. 87)

> We think it will suffice for us to refer to the well known authority of *AG of Duchy of Lancaster v. L & NW Railway Co* in which it was held that the summary procedure under the English rule which is identical to ours, can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable".

Abdul Hamid CJ (Malaya) in *Sim Kie Chon v. Superintendent of Pudu Prison* [1985] 2 MLJ 385, also applied these principles. His Lordship observed (at p. 386):

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: "the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable ...'

More recently, in the Supreme Court decision of *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, Mohamad Dzaiddin SCJ summed up the position as follows (at p. 43):

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd,* and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co*).

His Lordship then added (at p. 43):

> It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v. Moloney & Ors*). The authorities further show that if there is point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 (which is in *pari materia* with our O. 33 r. 2 of the RHC) (see *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

(b) The second principle of law which I would like to emphasise is this: In determining whether to strike out cases under O. 18 r. 19, the courts have wide discretionary powers.

(c) The High Court has inherent jurisdiction to prevent an abuse of its powers. Even if O. 18 r. 19 is not expressly pleaded, the High Court in exercise of its inherent jurisdiction may strike out cases which it deems to be an abuse of its process. Peh Swee Chin SCJ in the Supreme Court decision of *Raja Zainal Abidin bin Raja Haji Tachid & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 pointed out (at p. 23):

> It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19. Unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

(d) Except for an application under O. 18 r. 19(1)(a), on determining whether an action ought to be struck off under the other rules, the High Court ought to consider all the relevant evidence as stated in the affidavits before it.

Gopal Sri Ram JCA in the Federal Court decision of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 MLJ 113 observed as follows (at pp. 123):

> Sub-rule 2 of O. 18 r. 19 prohibits the use of affidavit evidence and confines the Court to four corners of a pleading only in applications made under para (a). It is settled beyond doubt that affidavit evidence is always admissible upon an application made under the other paragraphs of the first sub-rule or under the inherent jurisdiction of the court. See *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16.

In so considering the affidavit evidence, the Court, however, is not expected to conduct a "mini trial" or to hear lengthy arguments: See the Privy Council decision in *Tractors Malaysia Berhad v. Tio Chee Hing* [1975] 2 MLJ 1, followed by the Supreme Court in *Raja Zainal Abidin's* case, above.

For some recent decisions applying the above principles, see also the following decisions of the Court of Appeal in *Muniandy Subrayan & Ors v. Chairman & Board Member of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557 (where the Court held that in exercise of its discretionary powers, the case ought not to be struck off); *Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 MLJ 11 (on the facts of the case, the Court held that the case ought not to be summarily dismissed as it was not such a plain and obvious case).

Present Application

Mr Jagjit Singh, who appeared for Teguh, argued strenously that this was a proper case for this Court to exercise its discretion to strike off the counterclaim of Teguh. In brief, his arguments were that, even though Teguh admits to the loan being advanced by Yata, yet, as Yata had also claimed for an unauthorised or illegal interest on the loan, Teguh is now under no obligation to repay the loan on the ground that the entire loan transaction was illegal. Mr Jagjit Singh, went so far as to argue that Yata was not even entitled to obtain any restitutionary remedies in respect of the said loan transaction.

To support his contention that Teguh need not repay the loan to Yata as the loan was clearly illegal, Mr Jagjit Singh, cited a plethora of cases dealing with illegal contracts, particularly cases dealing with contracts which were in contravention of the Moneylenders Ordinance. Amongst the cases cited were, *Chow Yoong Hong v. Choong Fah Rubber Manufactory* [1962] AC 209 PC; *Menaka v. Lum Kum Chun* [1977] 1 MLJ 91 PC; *Yeep Mooi v. Hu Chin Chua* [1981] 1 MLJ 14 FC and the decision of the Singapore High Court in *Subramaniam Dhanapakiam v. Ghaanthimathi* [1991] 2 MLJ 447.

First, it has to be borne in mind that the Moneylenders Ordinance does not prohibit the mere lending of money by one person to another, but rather regulates the conduct of a moneylending business. As Chan Sek Keong J in the Singapore case of *Subramaniam*, above pointed out (at p. 448):

> The settled law is that what is prohibited by the Act was not moneylending but the business of moneylending. This is a question of fact. It is also settled law that the giving of a number of loans to friends does not constitute the business of moneylending, unless there is a system and continuity about the transactions.

Similarly, Lord Delvin in the Privy Council case of *Chow Yoong Hong*, above said (at p. 218):

> To lend money is not the same thing as to carry on the **business of moneylending.** In order to prove that a man is a moneylender within the meaning of the Ordinance, it is necessary to show some degree of system and continuity in his **moneylending transactions**.
>
> [Emphasis added]

Likewise in the Federal Court decision of *Ngui Mui Khin & Anor v. Gillespie* [1980] 2 MLJ 9, Salleh Abas FJ in delivering the judgment of the Federal Court observed as follows (at p. 12):

> At the outset we wish to observe that the Moneylenders Ordinance 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceble by the court.

In a subsequent case, *Yeep Mooi v. Chu Chin Chua & Ors*, above, Salleh Abbas FJ reiterated the scope of the legislation as follows (at pp. 15-16):

> We have on another occasion observed that the Moneylenders Ordinance, 1951 does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business (*Ngui Mui Khin*, above).

Mr Jagjit Singh relied on s. 3 of the Moneylenders Ordinance to argue that in the present case, there arose a presumption by virtue of this section that Yata was a moneylender. The said section reads as follows:

> any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

The scope of this section was explained by Thomson J in *Sadhu Singh v. Sellathurai* [1955] MLJ 117 as follows (at p. 119)

> ... once a single moneylending transaction is proved against a party then the onus of proving that he is not carrying on the business of moneylending passes to him. In this connection it is to be observed in considering the way in which the English Courts have applied the law to the facts of individual cases that the English Moneylenders Act of 1900 contains no "reversal of onus" provision similar to our s. 3.

In *Chow Yoong Hong's* case, the Privy Council expressly approved and adopted this view of Thomson J. See also the Federal Court case of *Chellapah v. Official Assignee* [1971] 1 MLJ 24.

In *Chow Yoong Hong's* case, Lord Devlin further explained the position as follows (at p. 219):

> It appears to their Lordships that if a defendant gives evidence that the plaintiff lent a sum of money at interest, that may be *prima facie* evidence – such as to make it necessary or desirable for the plaintiff to call evidence in answer to it – but it does not put any legal burden on to the plaintiff unless the evidence is accepted.

His Lordship then continued:

> If, at the end of the day, after hearing all the evidence on both sides, the judge does not accept it, that is to say, if he refuses to find that the plaintiff lent a sum of money at interest, then there is no presumption under s. 3 that the plaintiff is a moneylender: for the simple reason that the defendant has failed to **establish** that fact which he must **establish** if he relies on s. 3, namely, that the plaintiff lent a sum of money in consideration of a larger sum being repaid. But if at the end of the day the judge holds that that fact has been established, that is, that the plaintiff did lend a sum of money at interest, then there is a compelling presumption that the plaintiff is a moneylender and the judge must hold him to be so unless on the rest of the evidence in the case the plaintiff has established that he is not a moneylender.

It is also pertinent to point out that *Menaka's* case relied upon by counsel for Teguh is also not relevant for the present purposes, as the contract in that case was held to be illegal on the ground that the person who lent the money was running a moneylending business without a licence.

It is therefore clear from these cases that there must be suficient evidence before the court, so as to determine the issue whether a person is carrying on the business of moneylending. In the present case, there is no such evidence before this court. Such evidence, if any, is, in any case, best adduced during a trial: see generally, *Chellapah's* case, above.

The other cases cited by Mr Jagjit Singh deal with the question as to whether restitutionary relief may be granted under s. 66 of the Contracts Act, when a contract has been held to be illegal under the Moneylenders Ordinance. However, in the present case, the questions as to whether the loan granted by Yata was in fact illegal as contravening the Moneylenders Ordinance, and whether Yata was in *pari delicto*, have yet to be determined by this court.

Furthermore, I should also point out that the law relating to illegal contracts, and its effect, is not without uncertainties. As pointed out by the Federal Court in the recent decision of *Co-operative Central Bank Limited v. Feyen Development Sdn Bhd (No 1)* [1996] 1 SCR 75; [1995] 3 MLJ 313, the contravention of certain statutory provisions does not, in every case render a contract illegal and unenforceable. The effect of non-compliance of certain statutory provisions on a contract is a difficult question which the court has to decide only after considering the scope and intent of the legislation in question. As Edgar Joseph Jr FCJ pointed out ([1996] 1 SCR 75, at p. 82):

> ... the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from

> the language of the statute itself ... However, the general rule is subject to exceptions and, at the end of the day, it is a question of construction of the particular statute.

His Lordship further endorsed the following observations of Rogers CJ in *Corumo Holdings Ltd v. C Itoh Ltd* [1990] 3 ACSR 438, at p. 448, (at p. 91):

> ... a commercial judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.

See also the sequel to *Feyen Development,* above in *Co-operative Central Bank Limited v. Feyen Development Sdn Bhd (No 2)* [1997] 2 MLJ 829, wherein the Court of Appeal decision in *Harta Empat Sdn Bhd v. Koperasi Rakyat Bhd* [1997] 1 MLJ 381, was severely criticised. In *Feyen Development (No 1),* too, the decision in *Che Wan Development Sdn Bhd v. Cooperative Central Bank Berhad* [1992] 2 MLJ 365, which held that a third party charge, created in favour of a lender as security for an illegal loan granted by the lender to a director of the chargor company was void and unenforceable for breach of the Companies Act, was held to be wrongly decided, and was expressly overruled by the Federal Court, a point which was re-emphasised by the Federal Court in *Feyen Development (No 2).*

In *Feyen Development (No 1),* above, Edgar Joseph Jr FCJ also pointed out as follows [1996] 1 SCR 75, at p. 93:

> We would go further and say that to admit the defence of illegality to defeat the chargee society's application to enforce the charges by way of an order for sale, would, in the words of Mason J (as he then was) in *Yango Pastoral* (at p. 428), provide "a windfall gain" to the chargor company and others in a similar position. In consequence, such a result would impose substantial hardship upon the chargee society ...

As to the tests to be applied in determining whether a contract is prohibited by a particular statute such as to render it illegal and void, see also the judgments of Edgar Joseph Jr SCJ in *Coramas Sdn Bhd v. Rakyat First Merchant Bankers & Anor* [1994] 1 MLJ 369, and Gopal Sri Ram JCA in the Court of Appeal decision of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 MLJ 587, and the cases cited therein.

In the light of these recent decisions of the Federal Court, the earlier cases on illegal contracts would now have to be read with some caution. I may point out that many of the cases dealing with moneylending transactions were decided well before the landmark decisions of the Federal Court in *Feyen Development (No 1)* and *(No 2).* Whether a different view ought now to be

adopted need not be considered by me at this stage. However, in this regard I should observe that the decision of Gunn Chit Tuan J in *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v. Dato James Ling Beng King* [1989] 2 MLJ 249, where His Lordship struck off the case under O. 18 r. 19(1) on the ground that the contract in question was in contravention of the Banking Act 1973, and was therefore illegal as being contrary to public policy under s. 24(e) of the Contracts Act, ought now to be read with some reservations in the light of these recent decisions of the Federal Court.

There has also been much development in the law relating to restitutionary relief in respect of illegal contracts: see generally, Goff and Jones, *The Law of Restitution,* 4th edition, and the following two recent decisions dealing with payment of interest under an illegal contract, *Farrow Mortgage Services Pty Ltd v. Edgar & Ors* [1993] 114 ALR 1 (Federal Court of Australia), and the House of Lord decision in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] 2 All ER 961.

Conclusion

Reverting to the present application, it appears to me that to argue that the imposition of any interests by Yata (if at all there was any such imposition), renders the entire loan agreement illegal such as to absolve Teguh of its obligation to repay the sum of money loaned to it by Yata, is too simple an argument.

Besides this question of law, there is also a dispute as to exact amount of the loan granted by Yata to Teguh, Teguh contending that the loan granted was for RM377,481.90, and not RM401,576.48, as claimed by Yata.

The arguments of counsel for Teguh would appear to suggest that Teguh is now seeking to renege on its undertaking to repay the loan. In the light of the admission by Teguh that a loan was in fact granted to it by Yata, it would tantamount to doing injustice to Yata in the present application, if Yata's counterclaim was summarily dismissed by this court, even without first considering the merits of the case. The validity of the loan transaction itself is in question; the actual amount owing is disputed; the application of the Moneylenders Ordinance to invalidate the loan agreement has been raised but has yet to be determined by the court; the application of restitutionary relief, especially s. 66 of the Contracts Act has also to be determined. These are matters which are best raised at a trial.

It is, therefore, bewildering, as to how Teguh could possibly have made this application in the first instance to have Yata's counterclaim struck off summarily, when there are several important questions of fact and law to be

considered. It is now trite law, as pointed out above, that the court will only strike out cases "in plain and obvious cases", or where "the claim on the face of it is obviously unsustainable", or as Lord Diplock pointed out in *Tractors Malaysia Bhd v. Tio Chee Hing*, below, "it was an ineluctable inference from [the] facts and evidence ... [that] the action was bound to fail.

Whilst parties to proceedings are entitled to take advantage of the various provisions in the rules for a speedy diposal of their claims, parties ought to be slow in making applications which are clearly misconceived, or those which instead of assisting in the speedy disposal of cases, add to the already existing backlog. As stated above, this application by Teguh for summary disposal ought not to have been made in the first place. If at all, an application ought to have been made to strike out Yata's counterclaim for want of prosecution. The temerity of Teguh to make this application so as not only to deny Yata of any rights, but also to allow Teguh to enrich itself unjustly by not repaying the loan advanced to it by Yata is clearly misconceived. Yata must be given an opportunity to present its case. To strike off Yata's counterclaim under these circumstances, would certainly appear to be draconian in nature. No court of law will lend its hand to mete out injustices to a party to a proceeding. As Lord Diplock observed in the Privy Council decision of *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1, on appeal from Malaysia (at p. 1):

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution.

It should be pointed out that Yata also raised another objection to this application for striking off by Teguh at this stage of the proceedings. Yata argued that not only was this application by Teguh made after the close of the pleadings, but also after both Teguh and Yata, together with Malayan Banking had entered into the consent order (referred to in the earlier part of this judgment), whereby Yata agreed to the release of the title deeds by Malayan Banking to Teguh. Counsel for Yata pointed out that Yata would not have agreed to the consent order being recorded, had it known earlier that Teguh would be filing any such application before Yata's counterclaim was litigated. In his written submission, counsel for Yata concluded as follows:

> It should also be noted that this application is made by the plaintiff [Teguh] only after the title deeds were returned to them. It seems that everything had been carefully planned by the plaintiff so that the plaintiff could get both the title deeds and the loan. Had the defendant known of this intention of the plaintiff, the defendant would not have consented to the return of the title deeds ... Now the plaintiff claims that the loan is illegal ... and tries to avoid repayment of the loan.

As I have already found that Teguh's application to strike out Yata's counterclaim is misconceived for reasons already stated earlier, I make no findings on whether the delay on the part of Teguh to make this application, or whether the understanding between Teguh and Yata in recording the said consent order are in themselves grounds for rejecting Teguh's present application to strike out Yata's counterclaim.

I should also point out that to an objection raised by counsel for Yata, Mr Jagjit Singh pointed out that this application to strike out was being made not only under O. 18 r. 19(1)(a), but also under rr. 19(1)(b), (c) and (d).

Quite clearly Teguh's application to strike out Yata's counterclaim cannot fall within r. 19(1)(a). Rule 19(1)(a) applies only to clear cases where the pleadings disclose no cause of action. This certainly is not the case here. In the Federal Court decision of *New Straits Time (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd* [1985] 1 MLJ 226, Mohd Azmi FJ in considering the scope of O. 18 r. 19(1)(a) of the Rules of the High Court observed (at p. 227):

> It is therefore clear law that in an application to strike out pleadings under O. 18 r. 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable ...

See also generally, *The Supreme Court Practice, 1997,* para 18/19/11.

I also fail to appreciate how it could conceivably be argued that Yata's counterclaim is 'scandalous, frivolous or vexatious;' to fall within r. 19(l)(b); or that Yata's counterclaim 'may prejudice, embarrass or delay the fair trial of the action' (r. 19(1)(c); or even to argue that Yata's claim is 'an abuse of the process of the Court' (r. 19(1)(d). As to the scope of these rules, see generally, *The Supreme Court Practice, 1997* paras 18/19/12; 18/19/13; 18/19/14 and 18/19/15.

Epilogue

So often the very machinary provided for in the rules of procedure to expediate the early disposal of cases is invoked by parties making unmerited applications which have the effect of grinding to a halt the entire proceedings.

The rules of court providing for summary disposal of cases are intended to be invoked in clear and obvious cases – cases where defendants have no defences or where the pleadings disclose no causes of action. Yet, these very

provisions are often invoked in cases when they ought not to be invoked. Inevitably, the hearing of an application for summary disposal of cases is granted priority by the courts over the hearing of other cases and applications. Applications which clearly lack merits are invariably dismissed, resulting in the loss of the Court's time. To further aggravate the situation, the aggrieved party usually appeals to a higher court, thereby causing further delays in the hearing of the action proper itself. On a similar vein, Lord Diplock in *Tractors (Malaysia) Bhd v. Tio Chee Hing,* above, observed (at p. 3):

> They (their Lordships of the Privy Council) note with regret that even if the new action be now summarily dismissed it will have succeeded in delaying execution of the judgment in the old action for nearly three years – which may be longer than the period which would have been taken by its going to trial.

Maybe the time has come for the Rules Committee to consider whether a right of appeal against dismissal of actions for summary trials ought even to exist. A rule providing for the fixing of an early date for the hearing of the main suit itself on the dismissal of an application for summary trial may prove to be more effective in the early disposal of cases. As it is, by parties wrongly invoking the summary trial procedures in cases which are not 'plain and obvious', appear to cause further delays, and also to hinder the court's desire to have cases disposed of expeditiously. The present case is a case in point – the counterclaim of the defendant which was filed in 1992, still remains unresolved – even after 5 years.

Reported by Bernadette Soosai